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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 96

TOM HARLING,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the Yolo County, California, Superior Court Sitting as a State Court of Last Resort Upon Appeal From a Misdemeanor Conviction

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Subject Index

	Page
The opinion below	2
Statement of the grounds on which the jurisdiction of the United States Supreme Court is invoked	2
(1) The judgment and appeal below	2
(2) The statutory provision believed to confer on the United States Supreme Court jurisdiction to review the judgment in question by writ of certiorari	3
The questions presented for review	4
The constitutional provisions relied upon	4
Statement of the case	5
Argument and authority	12
(1) Petitioner's right to confront witnesses against him was unconstitutionally abridged by the trial court's refusal to allow petitioner the right to question his accuser concerning the paternity of the child unfettered by the trial court's precondition that petitioner have independent proof of sexual connection between the prosecutrix and others during the conceptive period	12
(2) Petitioner was deprived of due process of law and of the equal protection of the laws by a state rule of evidence which applied one standard of evidence to the case of the prosecution and another standard of evidence to the case of the defense in the same situation	16
Conclusion	22

Table of Authorities Cited

Cases	Pages
Commonwealth v. Harbaugh, 191 A. 2d 844 (Pa. Super. 1963)	15
Commonwealth v. Johnson, 58 Sch. L.R. 48	15
Crosat v. Paige, 147 Cal. App. 2d 385	14
Douglas v. State of Alabama, 85 S. Ct. 1074, 380 U.S. 415, 13 L. Ed. 2d 934	12
Griffin v. California, ... U.S. ....., 14 L. Ed. 2d 106, 85 S. Ct.	21
Holt v. Virginia, ... U.S. ....., 14 L. Ed. 2d 290, 85 S. Ct.	22
In re Sterling, 63 A.C. 509	3
In re Wiegand, 27 F. Supp. 725	3
I. v. D., 158 A. 2d 716 (N.J. Super. A.D.)	15
Lisenba v. People of the State of California, 62 S. Ct. 280, 314 U.S. 219, 86 L. Ed. 166, rehearing denied 62 S. Ct. 620, 315 U.S. 826, 86 L. Ed. 1222	4
People v. Beltran, 94 Cal. App. 2d 197, 210 Pac. 2d 238	21
People v. Brazil, 112 Cal. App. 326, 296 Pac. 639	18, 19
People v. Castro, 133 Cal. 12, 65 Pac. 13	18, 19
People v. Koller, 142 Cal. 621, 76 Pac. 500	19
Smith v. California (1959) 361 U.S. 147	3
Smith v. U. S., 331 F. 2d 265, certiorari denied 85 S. Ct. 49, 379 U.S. 824, 13 L. Ed. 2d 34, rehearing denied 85 S. Ct. 321, 379 U.S. 940, 13 L. Ed. 2d 350	15
Teitelbaum Furs v. Dominion Insurance Company, 58 Cal. 2d 601, 375 Pac. 2d 439	21
Thompson v. City of Louisville (1960) 362 U.S. 199	3
Twining v. State, 198 A. 2d 291 (Md. 1964)	15

Codes

Pages

California Penal Code, Section 270 ..... 2, 5, 18

28 United States Code, Section 1257(3) 3

Constitutions

United States Constitution:

Sixth Amendment 5

Fourteenth Amendment (Due Process Clause) 4, 5, 21

Rules

California Rules of Court, Rule 62(a) 3

Texts

West's General Digest (1963), Bastardy, Section 59 15

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Petitioner Tom Harling petitions for a writ of certiorari to review the Opinion and Decision on Appeal of the Yolo County, California, Superior Court sitting as a state appellate court of last resort affirming the judgment of the Justice Court of the Woodland Judicial District admitting petitioner to probation after a misdemeanor conviction of Failure to Provide for a Minor Child (which petitioner contended and does

contend is not his child) in violation of §270 of the *Penal Code* of the State of California.

THE OPINION BELOW

There was no reported decision, either official or unofficial, of the Opinion and Decision on Appeal of the Yolo County, California, Superior Court sitting as a state appellate court of last resort. The said Opinion and Decision on Appeal is attached hereto as Appendix I. There was no opinion in the trial court.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

(1) The Judgment and Appeal Below.

On May 21, 1965, the Justice Court of the Woodland Judicial District of Yolo County, California, denied defendant Tom Harling's Motion For A New Trial and Motion To Set Aside And Arrest The Verdict Of The Jury. On the same day, the Justice Court made and entered its Order Admitting Defendant To Probation which is attached hereto as Appendix II. Thereafter, on May 21, 1965 Notice of Appeal was filed. The Opinion and Decision on Appeal is dated November 29, 1965 and was entered on November 30, 1965. Petitioner's Motion For A New Trial was based inter alia upon the ground of newly discovered evidence as set forth by affidavit which is attached hereto as Appendix III.

(2) The Statutory Provision Believed to Confer on the United States Supreme Court Jurisdiction to Review the Judgment in Question by Writ of Certiorari.

Jurisdiction is conferred by section 1257 (3) of Title 28 of the *United States Code* which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

California convictions in Justice Courts are reviewable on appeal only in the Superior Court, which consequently becomes the highest court in which a decision may be had.

"In the absence of certification or published opinion, no further appeal" is authorized from the determination of the Appellate Department of the Superior Court in a misdemeanor case. *In re Sterling,* 63 A.C. 509 at page 510 citing Rule 62(a) of the *California Rules of Court.* See also *Smith v. California* (1959) 361 U. S. 147; *Thompson v. City of Louisville* (1960) 362 U. S. 199; and *In re Wiegand,* 27 F. Supp. 725.

Federal power may be invoked to set aside what a State regards as a fair trial if it is plain that a federal right has been invaded. *Lisenba v. People of the State of California,* 62 S. Ct. 280, 314 U. S. 219, 86 L. Ed. 166, rehearing denied 62 S. Ct. 620, 315 U. S. 826, 86 L. Ed. 1222.

THE QUESTIONS PRESENTED FOR REVIEW

(1) Was petitioner's right to confront witnesses against him as guaranteed by the Sixth Amendment, as the same applies to the States through the Fourteenth Amendment, unconstitutionally abridged by the trial court's refusal to allow petitioner the right to question his accuser concerning the paternity of the child?

(2) Was petitioner deprived of due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment by a State rule of law which applies one standard of evidence to the case of the prosecution and another standard of evidence to the case of the defense in the same situation?

THE CONSTITUTIONAL PROVISIONS RELIED UPON

(1) Constitution of the United States, Fourteenth Amendment, Due Process Clause:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

(2) Constitution of the United States, Fourteenth Amendment, Equal Protection of the Laws Clause:

> ". . . nor" (shall any State) ". . . deny to any person within its jurisdiction the equal protection of the laws."

(3) Constitution of the United States, Sixth Amendment (as the protections therein set forth are applicable to the States through the Fourteenth Amendment):

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

Petitioner was charged with a violation of section 270 of the *Penal Code* of the State of California, a misdemeanor. The crime is generally referred to as "Failure To Provide." After a change of venue from the Esparto Judicial District, the case was tried in the Woodland Judicial District Court before a jury. Petitioner was convicted. Petitioner denied paternity although he admitted relations with the mother but contended that they were at a time when the child could not have been conceived.

Concerning the disputed issue of paternity, the trial court advised defense counsel in chambers, at the request of the prosecutor, that defense counsel was not to make any inquiry concerning other sexual ac-

tivities on the part of Miss Monarrez (the mother) unless the defense was prepared to prove by way of impeaching evidence in the event of a denial that she did in fact have such relations during the period between January 1, 1964 and March 31, 1964. The trial court in its *Settled Statement of Fact* (there was no reporter at the trial) sets forth its ruling in this regard as follows:

> "The court ruled that evidence as to acts of sexual relations with Miss Monarrez was limited to the period between January 1, 1964 and March 31, 1964. Defense counsel was limited to making inquiry concerning other sexual activities on the part of Miss Monarrez unless the defense was prepared to prove by way of impeaching evidence in the event of a denial that she did in fact have relations during the period of possible conception." (*Settled Statement of Fact,* page 5, line 32 through page 6, line 7.)

The trial court did allow defense counsel to ask Miss Monarrez about other boys that she had dated on cross-examination and, in the words of the trial court's *Settled Statement of Fact* at page 6, lines 12-15:

> "Miss Monarrez testified that she had been out on dates with the following boys: Jerry Harling, Ron Giovanetti, Mike Coulter, Jim Wertman, Dennis Smith, Walter Olson, Brian Crutcher, and Mike Joy".

Because of the trial court's ruling, however, defense counsel was precluded from asking whether she had sexual relations with these boys, or any other boys,

during the period of possible conception set by the trial court without being prepared to prove "by way of impeaching evidence in the event of a denial" that she did in fact have relations during the period of possible conception.

Thus foreclosed from cross-examination of the mother by the court as to the paternity of the child by the court's prerequisite of independent impeaching evidence, the defense sought to introduce direct evidence of sexual relations at times when the child could not have been conceived. This offer of proof was made upon the theory that such proof yielded the inference of sexual relations during the crucial conceptive period set by the court. The court denied this offer of proof on the ground that it was not probative to show sexual connection during the conceptive period. However, the prosecution, over defense objection and assignment of misconduct and motion for a mistrial, was allowed to introduce evidence that petitioner and Miss Monarrez had sexual relations at times when the child could not have been conceived as that period was set by the court. This proof was allowed upon the same theory that the court found untenable when advanced by the defense, i.e. that such proof was probative to show sexual connection with the defendant during the conceptive period.

A portion of the People's evidence of sexual relations with petitioner at times when the child could not have been conceived involved direct testimony by Miss Monarrez of the felony of forcible rape by petitioner. Defense objection, assignment of misconduct, and

motion for mistrial were made when this testimony was adduced. The court ordered the testimony "stricken" although there was no record from which to strike. Thereafter, "The defense was permitted to allow the defendant to deny force." (*Settled Statement of Facts,* page 5, lines 31 and 32.)

The defense was not allowed to show evidence of unchastity however which the defense urged was admissible under the California rule that permits such evidence in cases where forcible rape is the main charge and the prosecution presents evidence of such force.

Throughout the trial during argument on the above points of evidence, again in the words of the trial court's Settled Statement of Fact:

> "The court recalls that during argument between counsel before the jury, the prosecutor used some of the following phrases: That defense counsel was 'highly unethical', 'highly unprofessional', 'grossly unprofessional', 'guilty of unprofessional conduct', 'deliberately trying to get before this jury questions that he knows are even improper to ask', 'I don't know whether I can assign misconduct to defendant's counsel or not' and 'I assign defense counsel as being guilty of prejudicial misconduct.'" (*Settled Statement of Fact, page* 10, lines 24-31.)

Subsequent to the jury verdict of guilt in support of petitioner's Motion For A New Trial, defendant submitted the affidavit of 16 year old Leslie C. Caldwell, Jr. who had dated Miss Monarrez on two occasions subsequent to the baby's birth (Miss Monarrez

having been 17 years of age at the time the child was conceived). On one of the dates Miss Monarrez had the child with her and Leslie asked whose baby it was. She replied, "It's Giovannetti's". Ron Giovannetti was one of the boys Miss Monarrez admitted dating but about whom the defense was not allowed to inquire as to sexual relations under the ruling of the trial court foreclosing cross-examination about paternity absent independent impeaching proof by the defense in the event of a denial.

The trial court held and the appellate department of the Superior Court affirmed that the new evidence was insufficient to warrant a new trial. The Superior Court stated in that regard:

> "At the best, insofar as it might be relevant, the new evidence would only have heightened conflicts already in the record or have been cumulative of evidence already adduced." (*Opinion and Decision on Appeal,* Appendix I, page xi.)

No challenge was ever made to the evidence of the Caldwell boy being offered in good faith as in fact "newly-discovered". In that regard the affidavit reads:

> "I knew nothing about Tom Harling's trial until April 30, 1965 when I heard about it at school. I am a Junior at Woodland High School. I then told my father, Les Caldwell, about what Helen had told me and he said, 'You should talk to Tom and tell what you know to see if you can help.' For that reason I got in touch with Marilyn Warford and asked her to have Tom get in touch with me about what Helen Monarrez had told

me." (*Affidavit of Witness re Newly Discovered Evidence,* Appendix III, page xviii.)

Petitioner's contentions herein were raised at the trial level by the foregoing offers of proof, objections, assignment of misconduct and motion for a mistrial. They were also raised upon the Motion For A New Trial and upon the Appeal by oral argument and reference to the record. Pertinent additional portions of the record certified to this Court are excerpted as follows concerning petitioner's contentions:

> "Miss Monarrez testified on direct examination that she did not consent to the act of sexual relations on the first occasion during the Yolo County Fair in 1963. She testified that she went with the defendant in his car into the country at approximately nine or ten at night. He stopped at the Canteen and bought some beer. They started making out—'kissing'. The witness then testified that he 'laid me on the seat', and 'raped me'. Objection by defense counsel was made and sustained by the court. The next question by the prosecutor was 'What did he do next?' The witness answered, 'He tore my underpants'. Objection was again made by defense counsel and an assignment of misconduct was made that such interrogation and evidence was highly prejudicial to the defendant and his rights in that it brought before the jury evidence of the crime of forcible rape at a time when the child could not possibly have been conceived and was of such an inflammatory nature that a mistrial should be granted." (*Settled Statement of Fact,* page 2, lines 13-28.)
>
> "Helen Monarrez further testified that the next act of sexual relations occurred on New Years

Day, 1964 in Tom's car, and that it was a voluntary act on her part. She further stated that Tom had a bottle of Vodka in his car." (*Settled Statement of Fact,* page 3, lines 11-14.)

"She testified that the child, Jana Rosalyn Monarrez, born 11-7-64 was conceived on February 18, 1964." (*Settled Statement of Fact,* page 3, lines 15 and 16.)

"Miss Monarrez testified that the last act of sexual relations with Tom Harling occurred on the Saturday night before Easter Sunday, and that the baby's father was Tom Harling." (*Settled Statement of Fact,* page 3, lines 25-27.)

"The defense urged the admissibility of the above evidence" (i.e. acts of sexual connection between the defendant's accuser and other men) "upon the grounds that if other acts of intercourse with the defendant at times when the child could not possibly have been conceived were probative to show probable intercourse with the defendant when the child was in fact conceived that then other acts of intercourse with other men were just as probative to show that they might be the father during the period of conception. The defense urged that it was highly prejudicial to allow evidence of the other acts with the defendant as probative to the main charge when they could not possibly yield the pregnancy in question but to preclude acts with other men during the same interim." (*Settled Statement of Fact,* page 5, lines 11-21.)

"The defense further urged that since the prosecution had brought in evidence of forcible rape and opened up this inquiry . . . that the defense should at least be allowed to neutralize

this inflammatory and prejudicial testimony as to an episode entirely collateral to the act of conception which Miss Monarrez contended yielded her pregnancy by proper testimony of her chastity as permitted in cases of forcible rape and any other proper impeachment." (*Settled Statement of Fact,* page 5, lines 22-29.)

"The court sustained the prosecutor's objections to all of the above testimony." (*Settled Statement of Fact,* page 5, lines 30 and 31.)

ARGUMENT AND AUTHORITY

(1) PETITIONER'S RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS UNCONSTITUTIONALLY ABRIDGED BY THE TRIAL COURT'S REFUSAL TO ALLOW PETITIONER THE RIGHT TO QUESTION HIS ACCUSER CONCERNING THE PATERNITY OF THE CHILD UNFETTERED BY THE TRIAL COURT'S PRECONDITION THAT PETITIONER HAVE INDEPENDENT PROOF OF SEXUAL CONNECTION BETWEEN THE PROSECUTRIX AND OTHERS DURING THE CONCEPTIVE PERIOD.

It is now clear that the Confrontation Clause of the Sixth Amendment is applicable to the States and that a primary interest secured by the Confrontation Clause is the right of cross-examination, *Douglas v. State of Alabama,* 85 S. Ct. 1074, 380 U. S. 415, 13 L. Ed. 2d 934.

Here the trial court prevented defense counsel from using this primary right of the defendant's to sift the truth of the accusations of Helen Monarrez as to the crucial issue of the paternity of the child by requiring the prerequisite of advance proof from the

defense that there was independent admissible evidence which the defense would produce by way of impeachment in the event of a denial. It seems fundamental to petitioner that he should have been able to establish his entire defense to the criminal charge against him by directly asking the prosecutrix about the paternity of the child through questions about her sexual activities in that regard. It is a commonplace that a reasonable doubt as to guilt is often raised by breaking down the testimony of the complaining witness. The trial court effectively cut off any such result by the restriction on cross-examination as to this fundamental issue. The appellate court upheld the trial court in its restriction of the fundamental right of cross-examination in a single paragraph by missing the point entirely and turning the matter on the insufficiency of the impeaching evidence. The appellate department opinion in that regard disposes summarily of petitioner's basic contention that he was denied prejudicially his right to cross-examination on the paternity issue as follows:

> "The 'Settled Statement of Facts' disposes of this contention. There was no showing that the evidence of Dennis Smith would relate to intercourse with Miss Monarrez during the period of possible conception. Nor does it appear any where that the witness Bailey would testify as to Dennis Smith having said at any time that he had intercourse with her at a definite time, particularly during the period of possible conception. The claimed evidence on this, to the contrary, is rather general." (*Opinion and Decision on Appeal,* Appendix I, page vii.)

The above language was in response to defendant's contention raised in the following language:

> *"The court prejudicially refused defense counsel the right to even ask questions concerning sexual relations with Miss Monarrez which might or might not have involved impeachment of a witness subpoenaed by the defense unless the defense could assure the court in advance what the witness' answer might be." (Opinion and Decision on Appeal,* Appendix I, page vi.)

The California law, even in a civil case, is clearly to the contrary and would allow the questioning. In *Crosat v. Paige,* 147 Cal. App. 2d 385 at page 389, Presiding Justice Peters speaks to this point as follows:

> "Another error committed by the trial court should be mentioned. Plaintiff was asked when testifying as an adverse witness under section 2055 of the Code of Civil Procedure, whether she had sexual relations with other men during June and July of 1952. Plaintiff objected on the grounds that the question was 'purely irrelevant, immaterial.' The objection was sustained. On appeal plaintiff seeks to sustain the ruling on the grounds that defendant made no offer of proof. The ruling was clearly erroneous. Evidence of plaintiff's sexual relations with other men at or about the time of conception is admissible. (*Estate of Gird,* 157 Cal. 534 (108 P. 499, 137 Am. St. Rep. 131); *Berry v. Chaplin,* 74 Cal. App.2d 652 (169 P.2d 442).) It is equally clear that no offer of proof is necessary where the examination is of an adverse witness. (*Tossman v. Newman,* 37 Cal.2d 522 (233 P.2d 1); *Lawless*

v. Calaway, 24 Cal.2d 81 (147 P.2d 604).)" *Crosat v. Paige,* 147 Cal. App. 2d 385, 305 Pac. 2d 121.

Undue restriction on the right of cross-examination may be violative of the Sixth Amendment. *Smith v. U. S.,* 331 F. 2d 265, certiorari denied 85 S. Ct. 49, 379 U. S. 824, 13 L. Ed. 2d 34, rehearing denied 85 S. Ct. 321, 379 U. S. 940, 13 L. Ed. 2d 350.

Petitioner's research has revealed no known authority for the proposition that the accusing witness in a case where paternity is in issue may not be cross-examined on the paternity issue in defense of such accusation. The cases to the contrary are legion. See for example: *Twining v. State,* 198 A. 2d 291 (Md. 1964), holding that some latitude must be allowed to a defendant in a bastardy case in order to protect one falsely accused and further that the mother may be interrogated regarding intercourse that might yield paternity and *Commonwealth v. Harbaugh,* 191 A. 2d 844 (Pa. Super. 1963) holding that countervailing evidence is admissible whether achieved by cross-examination or otherwise. To the same effect: *Commonwealth v. Johnson,* 58 Sch. L.R. 48 as cited in West's General Digest 1963, bastardy, section 59; *I. v. D.,* 158 A. 2d 716, (N.J. Super. A.D.)

The holding of the trial court that defense counsel might elicit from the prosecutrix the names of boys she admitted dating but could not ask her whether or not she had relations with these same boys without an advance showing of independent impeaching evidence in the event of a denial is unsupportable. The

only purpose of such admissions as to dating would be to yield the availability as to sexual connection with the defendant's accuser. Direct inquiry into such sexual relations was unconstitutionally precluded in this case rendering without substance petitioner's right to confrontation by cross-examination guaranteed to him under the United States Constitution.

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(2) PETITIONER WAS DEPRIVED OF DUE PROCESS OF LAW AND OF THE EQUAL PROTECTION OF THE LAWS BY A STATE RULE OF EVIDENCE WHICH APPLIED ONE STANDARD OF EVIDENCE TO THE CASE OF THE PROSECUTION AND ANOTHER STANDARD OF EVIDENCE TO THE CASE OF THE DEFENSE IN THE SAME SITUATION.

The prosecution's charge was that on or about October 22, 1964 defendant Tom Harling was the father of an unborn child of Helen Monarrez and that he "wilfully and unlawfully" omitted "without lawful excuse to furnish medical attendance to . . . the unborn child." (A copy of the complaint is attached hereto as Appendix IV.) Tom Harling's defense was that he was not the father of the child because, except for a visit to the doctor's office with his mother, he was ill at home on February 18, 1964 which was the date that Helen Monarrez fixed as the date of conception. The defendant's mother so testified corroborating his contention. The medical doctor who treated petitioner on February 18, 1964 also testified corroborating that fact.

The trial court fixed the date of possible conception between January 1, 1964 and March 31, 1964 and then

applied the California evidence rules which apply one standard to the prosecution's case and yet another standard to the defense case involving the same type of evidence. The Tweedledum and Tweedledee approach of the California cases as approved by the trial court and the Superior Court sitting as an appellate court in a situation where the inferences from proven facts are identical is as follows:

(a) The prosecution was allowed to show acts of sexual connection between Tom Harling and Helen Monarrez at times other than the period of possible conception set by the trial court. The rationale of allowing such evidence was that:

> "It appears that the evidence complained of was properly admissible as having a bearing on and tending to prove the commission of the crime charged against the defendant. An essential element here, of course, is paternity. Certainly, evidence of sexual intercourse tends to show paternity and evidence of intercourse by Miss Monarrez and defendant prior to the period concerned here (within the not remote past) tended to substantiate the occurence (sic) of intercourse by them at the time of claimed conception. Evidence of previous intercourse is competent to show the probability of the particular act having occured. (sic) (*Berry v. Chaplin,* 74 Cal. App. (2d) 652; *People v. Brazil,* 112 Cal. App. 326)" (*Opinion and Decision on Appeal,* Appendix I, page v.)

(b) The defense however was *NOT* allowed to show evidence of acts of previous intercourse between Helen Monarrez and other men based upon precisely the same theory of admissibility, i.e. that "Evidence

of previous intercourse" with men other than the defendant was just as competent to show that intercourse with the other men also continued on into and during the period of conception as set by the trial court to establish the defense contention "that the particular act" of conception occurred not with the defendant but with another man, or to at least raise the necessary reasonable doubt in that regard.

In a complete about face in reasoning the appellate court sustained the trial court's refusal to allow such evidence and applied an entirely contrary rule when it was the defense, rather than the prosecution, which sought to adduce the evidence of previous acts of intercourse in holding that:

> "The cases clearly establish that it is improper to show intercourse of the mother with other men at times other than at or about the time of conception. (8 Cal. Jur. (2d) 252) The time of possible conception was clearly established in this case." (*Opinion and Decision on Appeal,* Appendix I, page vi.)

The case of *People v. Brazil,* 112 Cal. App. 326, 296 Pac. 639 cited by the appellate court as yielding the admissibility of the prosecution's evidence also involved a prosecution under *Penal Code* section 270 wherein paternity was in issue. The Court in *Brazil* held that acts of intercourse before the alleged act resulting in conception were admissible as probative of intercourse during the conceptive period. In doing so, the Court in *Brazil* relied upon the 1901 California Supreme Court decision of *People v. Castro,* 133 Cal. 12, 65 Pac. 13, which held that acts of sexual con-

nection *"both before and after* the particular act charged" might be shown "to sustain the main allegation" (Emphasis supplied.) The Court in *Castro* declared at page 12:

> "The doctrine appears to be fairly well settled, that in actions of adultery, seduction etc., evidence of sexual intercourse between the parties, *both before and after the particular act charged,* may be introduced in evidence as tending to sustain the main allegation." (Emphasis added.)

The Court in deciding the *Brazil* case also relied on the buttressing and extending language of *People v. Koller,* 142 Cal. 621, 76 Pac. 500, 502, an incest case, under which the California Supreme Court holds with reference to the above rule from *Castro:*

> "We think this is a correct statement of the prevailing rule, and in principle applies, not only in prosecutions for adultery, but in prosecutions for all cognate offenses involving sexual intercourse by consent, including incest."

If the reasoning in *Castro, Koller,* and *Brazil* is the law, as it must be, then due process of law and equal protection of the laws demands that the same rule of law be applied to the evidence of the defense as well as the evidence of the State. If the acts of the defendant with his accuser at other times when the child could not possibly have been conceived were found, as they were, to be probative in the prosecution's case to show that there was probably an act or acts during the period of possible conception, then the acts of other men with Helen Monarrez before and after the period of conception were just as probative to show

that there were probably an act or acts with these same other men during the period of possible conception. The trial court denied such evidence when presented from the defense side of the counsel table but allowed such evidence on the part of the People. The defense offer of proof in this regard follows:

"The defense made the following offer of proof outside the presence of the jury:

1. That Jerry Harling would testify that he had relations with Helen Monarrez before his brother, the defendant, but that this was not within the period allowed by the court.

2. That Mike Kolb would testify that he had sexual relations with Helen Monarrez but not within the period allowed by the court. Both the Kolb and Jerry Harling testimony were as to times prior to the birth of the child in question.

3. That Dennis Smith had advised defense counsel that he had had relations with Miss Monarrez but not as to the date thereof. That on the eve of the trial the said Dennis Smith had called defense counsel advising him that he, Dennis Smith, planned to repudiate what he formerly stated as to sexual relationship and would testify that he had not had relations at all. That defense counsel had stated that he planned to call him to the witness stand to obtain his testimony under oath and that he assumed that he, Dennis Smith, would tell the truth.

4. That the defense had all three of the above witnesses under subpoena and, in addition, a witness named LeRoy Bailey who had heard the said Dennis Smith make an admission that he (Dennis Smith) had had relations with Helen Monarrez

'quite recently' before she announced that she was pregnant but that 'you have to watch out, it has the crabs.'

5. It was stipulated that the above offer of proof was properly made and that the witnesses need not be sworn and asked questions." (*Settled Statement of Fact,* page 4, line 16 through page 5, line 10.)

That a state rule of evidence may operate to deny an accused the rights guaranteed to him under the United States Constitution is no longer an open question. *Griffin v. California,* ..... U.S. ....., 14 L. Ed. 2d 106, 85 S. Ct. ..... Petitioner urges that the Fourteenth Amendment envisions and demands even-handed application of the rules of evidence to equally protect the rights of the accused in the presentation of his defense as well as to protect the prosecution in achieving justice for the State and that he was deprived of such protection in this case.*

---

*Of significance is the California doctrine of collateral estoppel which precludes petitioner from ever again challenging the paternity of the child, either in a civil action or another criminal trial. Thus, although the extant probation order is for only two years, the fact that paternity may never again be placed in issue by petitioner yields the result that to maintain his probation status (as it may be reinstated in other cases involving the same offense) petitioner must pay a total of $7,958.48 as a result of this misdemeanor conviction ($30.00 per month child support until age 21 plus $202.00 for the doctor and $196.48 for the hospital) and even more if the monthly support amount as a condition of probation be increased. See *Teitelbaum Furs v. Dominion Insurance Company,* 58 Cal. 2d 601, 375 Pac. 2d 439 and *People v. Beltran,* 94 Cal. App. 2d 197, 210 Pac. 2d 238.

CONCLUSION

Although the offense involved was only a misdemeanor, defendant was constitutionally entitled to a fair trial in a fair tribunal as a basic requirement of due process of law. An opportunity to be heard must necessarily embody the right to meaningful cross-examination and the right to equal-handed application of the rules of evidence to the prosecution and defense alike. *Holt v. Virginia,* ..... U.S. ....., 14 L. Ed. 2d 290, 85 S. Ct. ....., and cases there cited. Petitioner did not receive such a fair trial in the Woodland Justice Court.

Dated, Woodland, California,
January 24, 1966.

Respectfully submitted,
HARRY A. ACKLEY,
Attorney for Petitioner.

(Appendices Follow)

Appendix I

In the Superior Court of the State of California
in and for the County of Yolo

No. 2997

The People of the State of California,
Plaintiff,
vs.
Thomas Harling,
Defendant.

OPINION AND DECISION ON APPEAL

Hearing of the Appeal from Woodland Judicial District in the above entitled matter was held on August 13, 1965, and submitted to the Court. The Court has considered all the record, including the various briefs of the parties.

In the following opinion the Court will give consideration to all the grounds and points raised by defendant in his appeal. It finds that none of the *Grounds* specified in the Statement of Appeal are sufficient and that the judgment of the lower court must be affirmed.

Hereinafter the Court considers the briefs and arguments and specified grounds set up by defendant by treating, in turn, each of the specifications of alleged error set forth by defendant as "Contentions" at page 11, line 20, through page 14, line 1, of de-

fendant's *Statement on Appeal.* Each is discussed under the number given it by defendant; i.e., Contention I, Contention II, etc., and in each instance defendant's contention is set forth.

I.

Defendant's Contention I: The Court erred in allowing Helen Monarrez to remain in the courtroom when she was a witness and not an officer nor the victim of the alleged offense.

There was no error in allowing Miss Monarrez to remain in the Courtroom while excluding all other witnesses. The Court has the discretion to permit some witnesses to remain in the Courtroom while excluding others. It may except one or more witnesses from the operation of an order for exclusion. Such things lie within the discretion of the Court. (48 Cal. Jur. (2d) 356) Unless there was a patent, undeniably, prejudicial abuse of such discretion, the Trial Court's discretion must control. Such prejudicial abuse does not appear here.

II.

Defendant's Contention II: The Court deprived defendant of his legal right to the defense of mistake of fact under Penal Code Section 26 (Four) by refusing defendant's submitted instruction thereon in the exact language of CALJIC Instruction No. 71-B.

Defendant's claim that he was denied his legal right to defense of mistake of fact under Penal Code Section 26 (4) by the refusal of defendant's submitted

instruction thereon in the language of CALJIC Instruction No. 71-B is without merit.

It is true that "wilfulness" is an essential element of the crime charged. (*People v. Swiggy,* 69 Cal. App. 574) Here, however, defendant is arguing only on construction of the evidence. There is evidence which would belie defendant's paternity of the child. There is evidence also that supports a finding of paternity. Obviously, the jury believed the latter and so found. Of course, the jury also determined his "wilfulness" as required for the commission of the crime. This "wilfulness" could not possibly be belied by any "mistaken" belief that he had in non-intercourse. The jury must have believed he did have such intercourse. This being so, any claim he had of non-intercourse or of belief in non-intercourse could not possibly be considered a "mistake of fact" or as disproving criminal intent. (*People v. Fitzpatrick,* 78 Cal. App. 37)

III., IV., V.

Defendant's Contention III: The Court prejudicially failed to instruct the jury as to the purpose of the testimony permitted upon direct examination of the other crimes shown of statutory rape, contributing to the delinquency of a minor and furnishing liquor to a minor.

Defendant's Contention IV: The Court prejudicially failed to instruct the jury as to the purpose of the testimony permitted upon direct examination of the crime of forcible rape at a time when the child could not possibly have been conceived under the

Court's limiting period of between January 1, 1964 and March 31, 1964.

Defendant's Contention V: The Court prejudicially erred in refusing to grant defendant's motion for a mistrial when the Deputy District Attorney adduced evidence of forcible rape of the complaining witness by the defendant at a time when the child could not possibly have been conceived and in failing to give any instructions as to the purpose of this evidence.

From the "Settled Statement of Facts" in the record it appears that in the direct examination of the complaining witness, Miss Monarrez, questioning by the Assistant District Attorney did elicit answers that at the time of the 1963 Yolo County Fair defendant "laid me on the seat" and "raped me," and "tore my underpants." However, objection to this was sustained by the Court and the testimony was stricken and the jury was admonished to disregard such testimony. The testimony which was stricken and which the jury was admonished to disregard concerned a time outside the possible period of conception. It appears, however, from the "Settled Statement" that, despite the sustaining of objections on direct examination, and the admonition to the jury, defendant cross-examined the witness on this incident and elicited much of the material of which he now complains.

In view of the strength of other evidence presented in this case, and since the Court adequately admonished the jury, and even after the admonition defendant pursued the subject by questions related thereto,

it cannot be said that the above testimony of Miss Monarrez was prejudicially erroneous. (See cases collected in 4 Cal. Jur. (2d)—*Appeal and Error,* Sec. 623 and 624, p. 505, et seq.)

Obviously, no instruction to the jury, apart from the admonition, was required. The Trial Court's refusal to grant defendant's motion for a new trial on grounds concerning the above was proper.

Complaint is made also of failing to instruct the jury as to the purpose of testimony of other crimes, of statutory rape, contributing to the delinquency of a minor, and furnishing liquor to a minor. It appears that the evidence complained of was properly admissible as having a bearing on and tending to prove the commission of the crime charged against defendant. An essential element here, of course, is paternity. Certainly, evidence of sexual intercourse tends to show paternity and evidence of intercourse by Miss Monarrez and defendant prior to the period concerned here (within the not remote past) tended to substantiate the occurrence of intercourse by them at the time of claimed conception. Evidence of previous intercourse is competent to show the probability of the particular act having occurred. (*Berry v. Chaplin,* 74 Cal. App. (2) 652; *People v. Brazil,* 112 Cal. App. 326)

There is nothing in the record to indicate that a limiting instruction concerning the above was requested by defendant. There is no duty on the Court, absent request, to give such an instruction. (*Witkin: California Criminal Procedure,* 477, 478, 479, 492 et seq.)

VI.

Defendant's Contention VI: The Court prejudicially erred in refusing the defendant the right to present evidence of the unchastity of the mother by cross-examination and independent evidence to counter the evidence of forcible rape brought out by the prosecution. Although allowing the defendant to testify that he used no force on the prosecuting witness, since the defendant was entitled to counter by all proper evidence the denied consent of the prosecuting witness to the contention on her part that force was used.

There is no merit to this claim. The cases clearly establish that it is improper to show intercourse of the mother with other men at times other than at or about the time of conception. (8 Cal. Jur. (2d) 252) The time of possible conception was clearly established in this case.

VII.

Defendant's Contention VII: The Court prejudicially refused defense counsel the right to even ask questions concerning sexual relations with Miss Monarrez which might or might not have involved impeachment of a witness subpoenaed by the defense unless the defense could assure the Court in advance what the witness' answer might be.

The "Settled Statement of Facts" disposes of this contention. There was no showing that the evidence of Dennis Smith would relate to intercourse with Miss Monarrez during the period of possible conception. Nor does it appear any where that the witness

Bailey would testify as to Dennis Smith having said at any time that he had intercourse with her at a definite time, particularly during the period of possible conception. The claimed evidence on this, to the contrary, is rather general.

VIII., IX., X.

Defendant's Contention VIII: The Court prejudicially erred in refusing to grant the defense motion for an advisory verdict of acquittal or, in the alternative, for dismissal for failure to establish the corpus delicti at the close of the prosecution's case.

Defendant's Contention IX: The Court abused its discretion in permitting the prosecution to reopen on the last day of trial to establish an element of the corpus delicti which the Court had previously ruled was already present.

Defendant's Contention X: There is no evidence in the record of the establishment of a necessary element of the corpus delicti, namely that the medical attendance which the defendant allegedly failed to furnish was in fact necessary for the unborn child as distinguished from the mother.

The corpus delicti was established by the prosecution. Whether this was done before the prosecution was permitted to reopen its case in chief or after is really not material. However, it does appear that all necessary elements were established prior to the reopening. The reopening, of course, was entirely within the discretion of the Trial Court. Defendant ignores the fact that the Court could, in its discretion, allow

the prosecution's case in chief to be reopened to buttress its case instead of for supplying missing elements of the corpus delicti.

The complaint before the Court, and upon which trial was held, charged that defendant "did wilfully and unlawfully omit without lawful excuse to furnish medical attendance to Helen Monarrez, and the unborn child," a violation of Penal Code Section 270. Within the provisions of Penal Code Sections 959 and 960 there seems to have been no prejudice to defendant in the form of the complaint. The jury was instructed on Section 270 insofar as it relates to the child. It is true that this instruction concerns a much broader field than mere lack of "medical attention" to the infant. However, the record supports a finding that there was no furnishing of medical attention by defendant to the child at the time concerned. As a matter of fact, this is strengthened by the showing that there was no furnishing at the time of delivery as well, both of which services were attested to by Dr. Sobeck. The failure of defendant to furnish such medical attendance was testified to by Miss Monarrez.

Wilfulness and lack of lawful excuse are presumed from the evidence of omission by defendant to furnish the medical attendance. (Penal Code Sec. 270)

The establishment of paternity has already been discussed.

The evidence, fairly construed, does show that the corpus delicti was established.

XI.

Defendant's Contention XI: The Court prejudicially erred in failing to allow the defense to establish evidence shown by defendant's offers of proof.

The various offers of proof made by defendant (in addition to those already considered) have been reviewed. The Court had restricted (properly) the evidence of intercourse by Miss Monarrez with others than defendant to a definite period. The law on this has been discussed previously. The offers of proof of intercourse of others with her at other times were properly rejected.

The offer of proof concerning testimony of one Dennis Smith and of other witnesses concerning statements of said Smith was properly rejected. The crux of this offer has been discussed hereinabove.

There was no prejudice or error in the ruling of the Court on the offer of proof concerning the testimony of Bill D. White.

XII.

Defendant's Contention XII: The Deputy District Attorney was guilty of prejudicial misconduct before the jury in misstating the evidence in argument, in repeatedly personally attacking defense counsel, asking degrading and irrelevant questions of the defendant on cross examination, in bringing out evidence of other irrelevant crimes of the defendant without stated purpose or submitted limiting instruction, in arguing the necessity of support payments to

the jury, in arguing age discrepancy, mismatch, animal act, animal passion, an act of pure lust, no love on the part of the defendant and similar characterization, in improperly asking his own witnesses if they were telling the truth and if they knew the meaning of the oath.

The actions and statements of the Assistant District Attorney in this case were far from exemplary. However, while not condoning them, the Court cannot say that any one of them, or the aggregate of them, constituted prejudicial error. Undoubtedly, they were vexatious. The Trial Court exercised proper discretion in the handling of these matters when objection was made thereto. The vexation caused and the poor impression that such matters may have had on the jury, are more than offset by the strength of the case against defendant.

XIII.

Defendant's Contention XIII: The complaint improperly charges and the verdict improperly finds the defendant guilty of failing to provide for Helen Monarrez which is not a crime in the State of California.

The complaint herein charges non-support of "Helen Monarrez, and the unborn child." The jury was instructed only on non-support of the child. The whole trial proceeded on that basis. There seemed to be no doubt about that—at any time during the trial, while evidence on the paternity issue, on the lack of furnishing of medical attendance, or on other

matters was presented. The verdict is simply of guilt of violation of Penal Code Sec. 270.

A fair degree of liberality in pleading is permitted under Penal Code Sec. 959 and 960. No substantial right of defendant was infringed.

See: Penal Code Sec. 956, 957, 959, 960. *In re Messner*, 30 Cal. App. (2) 290.

XIV.

Defendant's Contention XIV: The Court should have granted defendant's motion for a new trial upon the above grounds and upon the affidavit of Leslie C. Caldwell, Jr., as to newly-discovered evidence which could not, with due diligence, have been discovered and produced by the defendant upon trial and which is material to the defendant in that it involved a direct admission by the prosecuting witness that someone else is the father of the child in question.

In the absence of abuse, the Court must abide by the discretion of the Trial Court in refusing to grant a new trial upon the ground of newly discovered evidence. There appears to have been no abuse of discretion here sufficient to hold the Trial Court in error. At the best, insofar as it might be relevant, the new evidence would only have heightened conflicts already in the record or have been cumulative of evidence already adduced.

There appears to be no merit in any of the grounds specified as being relied upon by appellant on this appeal. (Page 1, line 21 to Page 2, line 1, of Defend-

ant's Statement on Appeal.) Accordingly, the judgment of the Trial Court is affirmed.

Dated: November 29, 1965.

James C. McDermott,
Judge of the Superior Court.

State of California
County of Yolo—ss.

I, Laurence P. Henigan, County Clerk of the above entitled County, and ex-officio Clerk of the Superior Court thereof, do hereby certify that the foregoing is a full, true and correct copy of the original on file in my office, and that I have carefully compared the same with the original.

Witness, my hand and the seal of said Superior Court this 30th day of Nov. 1965.

Laurence P. Henigan, Clerk,
By Virginia Nichols, Deputy.

Filed November 30, 1965,
Laurence P. Henigan, Clerk,
By Virginia Nichols, Deputy.
Recorded in Book 12, page 321.

Appendix II

In the Justice Court of Woodland Judicial District
County of Yolo, State of California

2A-3676

Charge: Violation of Section 270 of the California Penal Code, failure to provide.

The People of the State of California,
Plaintiff,
vs.
Tom Harling,
Defendant.

ORDER ADMITTING DEFENDANT TO PROBATION

The defendant, Tom Harling, having appeared before the above entitled Court in answer to a Complaint charging said defendant with the alleged commission of the crime of Misdemeanor, to wit: violation of Section 270 of the California Penal Code, failure to provide and said defendant having been found guilty of the commission of said crime charged in said Complaint and having made application to this Court for probation; and the Court having duly inquired into the facts and circumstances of the commission of the crime and into the character of said

defendant, and the Court being fully advised in the premises;

It is Ordered, Adjudged and Decreed that the above named defendant, Tom Harling is guilty, as charged in said Complaint, of the commission of the crime of Misdemeanor, to wit: Violation of Section 270 of the California Penal Code, failure to provide and it is by the Court ordered, as punishment for the conviction of said crime, that said defendant be imprisoned in the County Jail of the County of Yolo, State of California, for the term of six months.

It is Further Ordered, Adjudged and Decreed that the execution of the sentence imposed herein be suspended and that said defendant be released on probation for the term of two years, upon the following restrictions, terms and conditions.

1. That said defendant shall not violate any City or County Ordinance or State or Federal Law and shall conduct himself as a respectable law-abiding citizen;

2. That said defendant shall report in writing or in person, to the Probation Officer of the County of Yolo, State of California, once each month during the term of probation, giving such information as is required by said Probation Officer;

3. That said defendant shall not leave the State of California during the term of his probation;

4. That said defendant shall pay $50.00 per month through the Probation Office for the support and

medical care and hospital expenses of the minor child, Jana Rosalyn Monarrez as follows:

$10.00 per month on Doctors expenses until total amount of $202.00 is paid.

$10.00 per month on Hospital expenses until total amount of $196.48 is paid.

$30.00 per month support for child.

Said payments commencing for the month of June, 1965 and for each month thereafter until further order of the Court.

Defendant is hereby informed of his rights and privileges under section 1203.4 of the Penal Code of the State of California, in that every defendant who has fulfilled the conditions of his probation for the entire period thereof or has been discharged prior to the termination of the period of probation, shall at any time prior to the maximum period of punishment for the offense for which he has been sentenced, be permitted by the Court to withdraw his plea of guilty or the Court shall set aside a verdict of guilty and the Complaint against him shall be dismissed and he shall be released from all penalties or disabilities resulting from the conviction. The probationer may make such application for change of plea in person or by his attorney or by the Probation Officer authorized in writing to appear in his behalf.

It is Further Ordered, Adjudged and Decreed that if the defendant shall fail, refuse or neglect to comply with any of the foregoing conditions, this probation

shall be revoked and the sentence herein imposed shall be executed.

Dated: May 21, 1965.

Clarence Walden,
Judge of said Judicial District.

I hereby certify that I have received a copy of the above order; that I have read the same; understand the terms thereof, and promise and agree to abide by the conditions set forth in said order.

Tom Harling, Defendant.

Appendix III

In the Woodland Judicial District Court for the County of Yolo, State of California

The People of the State of California,	Plaintiff,
vs.	
Thomas Harling,	Defendant.

AFFIDAVIT OF WITNESS RE NEWLY DISCOVERED EVIDENCE

State of California
County of Yolo—ss.

Leslie C. Caldwell, Jr., being first duly sworn, deposes and says:

My name is Leslie C. Caldwell, Jr. I am sixteen years of age. I reside with my parents at 1246 Donnelly Circle, Woodland, California. My telephone number is 662-0172.

I have had two dates with Helen Monarrez and I have known her about two months. I first met her in the Thrifty Drug Store parking lot in Woodland, California at or about 3:30 p.m. on or about March 15, 1965. At that time I was with Jerry Hubert who has also dated Helen Monarrez. Jerry Hubert was with Yvonne Haley on March 15, 1965 and he introduced me to Helen. Helen had her baby with her when I met her.

After meeting Helen, she, Yvonne, and Jerry and me all got into Jerry's car and parked there in the

Thrifty Parking Lot. Jerry and Yvonne were making out in the front seat and I was in the back seat with Helen just talking to her. By making out I mean kissing. The baby was in between Helen and me on the back seat at this time.

I said to Helen during the conversation: "Whose baby is it?" She replied: "It's Giovannetti's." She never at any time told me that it was Tom Harling's or anyone else's. I had a second date with Helen about a week later. Jerry Hubert and Yvonne were along too. We just rode around out in the country and back in town. We did not talk about the baby on that date.

I knew nothing about Tom Harling's trial until April 30, 1965 when I heard about it at school. I am a Junior at Woodland High School. I then told my father, Les Caldwell, about what Helen had told me and he said, "You should talk to Tom and tell him what you know to see if you can help." For that reason I got in touch with Marilyn Warford and asked her to have Tom get in touch with me about what Helen Monarrez had told me.

If I were called to the stand and sworn as a witness I would testify to the above facts.

/s/ Les Caldwell
Leslie C. Caldwell, Jr.
Affiant.

Subscribed and sworn to before me this 6th day of May, 1965 at Woodland, California.

(Seal) Harry A. Ackley,
Notary Public for the County of Yolo,
State of California.
My Commission Expires Jan. 14, 1969.

Appendix IV

In the Justice Court of Esparto Judicial District
County of Yolo, State of California

The People of the State of California,
Plaintiff,

vs.

Tom Harling,
Defendant.

COMPLAINT

Helen Monarrez of Esparto in the County of Yolo, State of California, being first duly sworn, makes complaint and deposes and says, that in Esparto, County of Yolo, State of California, on or about the 22nd day of October, 1964, and before the filing of this complaint, the crime of failure to provide for his unborn child, a misdemeanor, a violation of Section 270, P. C. was committed by Tom Harling who is now in the County of Yolo, as follows, to wit:

The said Tom Harling at the time aforesaid, and at Esparto Judicial District in the County of Yolo and State aforesaid, then and there being the father of the unborn child of Helen Manarrez, did wilfully and unlawfully omit without lawful excuse to furnish medical attendance to Helen Monarrez, and the unborn child, all of which is contrary to the statute in such cases made and provided, and against the peace and dignity of the people of the State of California.

Said complainant therefore prays that a warrant may be issued for the arrest of the said Tom Harling and that he may be dealt with according to law.

Helen Monarrez
/s/ Helen Monarrez

Subscribed and sworn to before me this 22nd day of October, 1964.

/s/ V. F. Vieira
V. F. Vieira
Judge of said Judicial District

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MAY 21 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 996

TOM HARLING,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT, YOLO COUNTY, STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

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TOPICAL INDEX

	Page
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
Statement of the Case	2
Statement of the Facts	2
ARGUMENT	
I. THIS COURT DOES NOT HAVE JURISDICTION IN THAT PETITIONER HAS NOT PRESENTED HIS CONTENTIONS TO THE HIGHEST STATE COURT IN WHICH A DECISION COULD BE HAD	4
II. PETITIONER'S RIGHT TO CROSS-EXAMINE THE COMPLAINING WITNESS WAS NOT UNCONSTITUTIONALLY ABRIDGED	5
III. PETITIONER WAS NOT DEPRIVED OF DUE PROCESS BY THE INTRODUCTION INTO EVIDENCE OF HIS ACTS OF PRIOR INTERCOURSE WITH HELEN MONARREZ	9
CONCLUSION	11

TABLE OF AUTHORITIES

CASES

	Page
Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624	7
Edwards v. California, 314 U.S. 160	4
Judy v. Pepersack, 284 F.2d 443, *cert. denied* 81 S.Ct. 1667, 366 U.S. 939, 6 L.Ed.2d 850	11
People v. Ashcraft, 138 Cal.App.2d 820, 292 P.2d 676	6
Pointer v. Texas, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065	7
Price v. Johnston, 125 F.2d 806, *cert. denied* 316 U.S. 677, 62 S.Ct. 1106, 86 L.Ed. 1750	11
Rea v. Missouri, 17 Wall. 532, 84 U.S. 532, 21 L.Ed. 707	7
Robinson v. California, 370 U.S. 660, 8 L.Ed. 2d 758, 82 S.Ct. 1417	4
Shama v. United States, 94 F.2d 1	7
Smith v. United States, 331 F.2d 265, *cert. denied* 85 S.Ct. 49, 379 U.S. 824, 13 L.Ed.2d 34, *rehearing denied* 85 S.Ct. 321, 379 U.S. 940, 13 L.Ed.2d 350	8
Talley v. California, 362 U.S. 60	4
Thomas v. United States, 121 F.2d 905	10
United States v. Bender, 218 F.2d 869	6

CODES

28 U.S.C. § 1257	2
28 U.S.C. § 1257(3)	2
California Penal Code, § 270	3, 20, 21, 23, 25
California Penal Code, § 1471	5, 27

MISCELLANEOUS

California Rules of Court, § 63	2, 4, 5, 27

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 996

TOM HARLING,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT, YOLO COUNTY, STATE OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

Petitioner seeks a writ of certiorari to review the judgment of the Superior Court, Yolo County, State of California, affirming a judgment of conviction of the Justice Court, Woodland Judicial District, entered in the above entitled case on November 29, 1965. That opinion which is unreported is set forth in Appendix A hereto.

JURISDICTIONAL STATEMENT

Jurisdiction for the present petition for certiorari is sought pursuant to the provisions of Title 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Was petitioner's right to cross examine the complaining witness unconstitutionally abridged?

2. Was petitiones deprived of due process of law by the introduction into evidence of his acts of prior intercourse with the complaining witness?

STATUTES INVOLVED

The pertinent statutes and constitutional provisions are set forth in Appendix B attached hereto.

STATEMENT

Statement of the Case

On May 21, 1965, in the Justice Court of the Woodland Judicial District, County of Yolo, State of California, the petitioner, who was represented by counsel, was found guilty of a violation of section 270 of the California Penal Code. On May 21, 1965, judgment was entered. On appeal to the Appellate Department of the Superior Court of the State of California, in and for the County of Yolo, the Superior Court affirmed the judgment.

Petitioner did not apply for certification of his case to the District Court of Appeal as provided for under Rule 63 of the California Rules of Court.

Statement of the Facts

On or about October 22, 1964, one Helen Monarrez caused a complaint to be filed against petitioner alleg-

ing that said petitioner was the father of her unborn child and that petitioner had wilfully and unlawfully failed to furnish medical attendance to herself and the unborn child. (Petition for a Writ of Certiorari, Appendix IV.)

Trial was commenced on or about May 21, 1965. At trial, it was adduced that Helen Monarrez and petitioner had first engaged in an act of sexual relations during the Yolo County Fair in 1963 (Settled Statement of Facts, page 32, attached hereto as Appendix C). After that, petitioner and Helen Monarrez engaged in numerous acts of sexual relations from January of 1964 to March 28, 1964 (Appendix C, pages 33, 34). During this period of time, Helen Monarrez became pregnant by petitioner. The child was born on November 7, 1964 (Appendix C, page 38). Helen Monarrez testified that petitioner had failed to provide any food, clothing, shelter, or medical attendance, and that he had not paid her any money (Appendix C, page 32).

Petitioner admitted engaging in sexual relations with Helen Monarrez but denied paternity (Appendix C, page 39).

The jury apparently resolved the question of paternity adversely to petitioner and found him guilty of "Failure to Provide", a violation of Section 270 of the California Penal Code, a misdemeanor (Appendix B) as charged.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION IN THAT PETITIONER HAS NOT PRESENTED HIS CONTENTIONS TO THE HIGHEST STATE COURT IN WHICH A DECISION COULD BE HAD

The jurisdictional statute permitting this court to review state court cases by certiorari relates only to final judgments and decrees rendered "by the highest court of a State in which a decision could be had" (28 U.S.C. 1257).

Petitioner was convicted of "Failure to Provide" in the Justice Court, Woodland Judicial District, State of California. He appealed this decision to the Appellate Department of the Superior Court, Yolo County, State of California. That court affirmed the decision. Petitioner did not seek certification as provided for by Rule 63,[1] California Rules of Court, to the District Court of Appeal. Therefore, he has not obtained a final judgment "by the highest court of a State in which a decision could be had" (28 U.S.C. 1257).

While the cases of *Talley* v. *California*, 362 U.S. 60; *Edwards* v. *California*, 314 U.S. 160; and *Robinson* v. *California*, 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417, affirmatively state that the Appellate Department of the Superior Court was the highest court available to the petitioner in those cases, it should be noted that these cases were decided before

[1] See Appendix B.

the enactment of Rule 63, California Rules of Court, in January 1962 (Calif. Pen. Code § 1471).

Respondent submits that the judgment of the Appellate Department of the Superior Court, Yolo County, State of California, affirming the judgment of the Justice Court, Woodland Judicial District, is not a judgment of the highest court of the state in which a decision of the case could be had because state procedure provides for discretionary review of that appellate court's judgment in the District Court of Appeal. Such discretionary review was not applied for.

II. PETITIONER'S RIGHT TO CROSS-EXAMINE THE COMPLAINING WITNESS WAS NOT UNCONSTITUTIONALLY ABRIDGED

Petitioner contends that the trial court restricted cross-examination of the complaining witness, Helen Monarrez, thus violating his right to confront witnesses under the Sixth and Fourteenth Amendments.

This is not a correct statement of the record in this matter.

The record reflects that the court limited evidence of sexual relations with Miss Monarrez to the period between January 1, 1964 and March 31, 1964 (the period of possible conception). The attorney for petitioner was limited to making inquiry concerning other sexual activities on the part of Miss Monarrez unless he was prepared to prove by way of impeaching evidence in the event of a denial that she did in fact have relations during the period of possible conception

(Appendix C, pages 34, 35, 36). Petitioner made no offer of proof.

The record further reflects that petitioner did extensively cross examine Miss Monarrez as to her activities on February 18, 1964, and as to whether she loved petitioner and whether they had discussed marriage (Appendix C, page 37). Under cross-examination, Miss Monarrez denied telling one LeRoy Bailey on March 22, 1965, that "I would marry Tom if he came back to me. Tom is a good lover and good in bed" (Appendix C, page 37). Petitioner was also allowed to cross examine Miss Monarrez as to the number of boys she had been dating (Appendix C, page 37).

As was stated in *People* v. *Ashcraft*, 138 Cal.App.2d 820, 827, 292 P.2d 676:

> "In the exercise of a sound discretion, the trial judge may determine the extent of the cross-examination. (*People* v. *Serpa,* 67 Cal.App.2d 327, 332 (154 P.2d 6); *People* v. *Corlett,* 67 Cal.App.2d 33, 57 (153 P.2d 595, 564 (sic)).) . . ."

The federal rule which is comparable is set forth in the case of *United States* v. *Bender,* 218 F.2d 869, wherein the court stated at page 873:

> "The extent of cross-examination is a matter within the discretion of the trial judge and this court will review the exercise of that discretion only to determine whether or not it has been abused. (Citations)"

Again at page 874 the court stated:

> "The trial judge's duty to see that the evidence is presented to the jury in as orderly and understandable a manner as possible requires that he have broad discretion in such matters. The defendant gave no definite reasons for his attempted examinations. He made no offers of proof. In each case he merely said that he thought the questions were proper and in each case the questions sought information on matters not raised on direct examination. We find in this record no abuse of discretion on the part of the trial judge in refusing to permit the witnesses to answer these questions."

See also: *Alford* v. *United States,* 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624; *Shama* v. *United States,* 94 F.2d 1; *Rea* v. *Missouri,* 17 Wall. 532, 84 U.S. 532, 21 L.Ed. 707.

The trial judge did not abuse his discretion in this case. Petitioner, by attempting to cross-examine Miss Monarrez as to prior unchastity at a time when conception could not have possibly taken place appears to have elected to try the case on the basis of "when you have no case, intimate misconduct on the part of the witnesses and *try them*—not the case." The court properly restricted petitioner in this regard. Certainly, there is nothing in the record before the court to show that the court in any way prohibited legitimate cross-examination of Miss Monarrez.

This is not a situation such as was present in the case of *Pointer* v. *Texas,* 380 U.S. 400, 13 L.Ed.2d 923,

85 S.Ct. 1065, where this Court held that the constitutional right of an accused to be confronted with the witnesses against him was denied where, at a state criminal trial the transcript of a witness' testimony given at the preliminary hearing was admitted as evidence, and this testimony was taken at a time and under circumstances affording the accused no adequate opportunity to cross-examine the witness through counsel.

In the case at bar, petitioner was represented by counsel. The complaining witness was present in court. The attorney for petitioner was allowed to cross-examine the complaining witness quite extensively. The only limitation the trial court imposed was that his questioning be relevant and material. Most certainly, the limitation did not amount to a denial of petitioner's right of confrontation.

The case of *Smith* v. *United States,* 331 F.2d 265, *cert. denied* 85 S.Ct. 49, 379 U.S. 824, 13 L.Ed.2d 34, *rehearing denied* 85 S.Ct. 321, 379 U.S. 940, 13 L.Ed.2d 350, cited by petitioner has no application to the case at bar.

In *Smith* v. *United States, supra,* the court held that the defendant was not prejudiced where a government witness repeatedly invoked the privilege against self-incrimination thereby denying defendant the opportunity of cross-examination.

In the case at bar, the complaining witness invoked no privilege against self-incrimination. The trial court

permitted all legitimate cross-examination. Petitioner's contention that the trial court restricted cross-examination of the complaining witness, thus violating his right to confront witnesses under the Sixth and Fourteenth Amendments, is unsupported by the record and patently without merit.

III. PETITIONER WAS NOT DEPRIVED OF DUE PROCESS BY THE INTRODUCTION INTO EVIDENCE OF HIS ACTS OF PRIOR INTERCOURSE WITH HELEN MONARREZ

Petitioner contends that he was deprived of due process in that the prosecution was allowed to introduce evidence of his prior acts of intercourse with the complaining witness as tending to show the probability of paternity. Petitioner contends that he should be allowed to show acts of prior intercourse of the complaining witness with other individuals at a time before the possibility of conception to show the same probability.

This contention was answered by the superior court sitting as an appellate court as follows:

> "It appears that the evidence complained of was properly admissible as having a bearing on and tending to prove the commission of the crime charged against defendant. An essential element here, of course, is paternity. Certainly, evidence of sexual intercourse tends to show paternity and evidence of intercourse by Miss Monarrez and defendant prior to the period concerned here

(within the not remote past) tended to substantiate the occurrence of intercourse by them at the time of claimed conception. Evidence of previous intercourse is competent to show the probability of the particular act having occured (sic). *(Berry* v. *Chaplin*, 74 Cal.App. (2) 652; *People* v. *Brazil*, 112 Cal.App. 326). . . ." (Appendix A, page 17.)

"The cases clearly establish that it is improper to show intercourse of the mother with other men at times other than at or about the time of conception. (8 Cal.Jur. (2d) 252). . . ." (Appendix A, page 18.)

The applicable federal law has been set forth in the case of *Thomas* v. *United States,* 121 F.2d 905, at page 909 wherein the court stated:

"It is next contended that the court erred in excluding from evidence the statement of a witness, called on behalf of appellant, to the effect that the witness had had sexual intercourse with the mother of the child on many occasions prior to July, 1937. The statement was clearly irrelevant. In a proceeding of this nature, the sole issue is the paternity of the illegitimate child, and the chastity of the mother is immaterial. 'Lewd conduct of the complainant is no defense, unless it tends to show that another than defendant is, or may be, the father of the child.' Hence, evidence that the mother had intercourse with another man at a period of time which, in the course of nature, could not result in the conception complained of, is not relevant to the inquiry and is, therefore inadmissible. . . ."

There is no question but that the material sought to be introduced by petitioner pertaining to the prior unchastity of Helen Monarrez was properly excluded.

The above argument presented by the petitioner does not show any conduct on the part of the court which was such as to deprive the accused of some right or immunity secured to him by the United States Constitution. Indeed, this should not even constitute prejudicial or any error, but even if there were error, it did not amount to a deprivation of a constitutional right amounting to a denial of the essence of a fair trial. The admission or exclusion of evidence in this case does not present a federal question. (*Price* v. *Johnston,* 125 F.2d 806, *cert. denied* 316 U.S. 677, 62 S.Ct. 1106, 86 L.Ed. 1750; *Judy* v. *Pepersack,* 284 F.2d 443 *cert. denied* 81 S.Ct. 1667, 366 U.S. 939, 6 L.Ed.2d 850.)

CONCLUSION

The record in this matter discloses that the trial court did not restrict petitioner's right to cross-examine the complaining witness to the point where his constitutional rights were abridged. Nor was petitioner deprived of due process by the exclusion of certain irrelevant evidence at trial.

It is submitted that petitioner was fully accorded his rights as guaranteed under the United States Constitution, both at trial and on appeal.

It is therefore respectfully submitted that the petition for certiorari presents no substantial federal question and should be denied.

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APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF YOLO

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,* vs. THOMAS HARLING, *Defendant.*	No. 2997 OPINION AND DECISION ON APPEAL

Hearing of the Appeal from Woodland Judicial District in the above entitled matter was held on August 13, 1965, and submitted to the Court. The Court has considered all the record, including the various briefs of the parties.

In the following opinion the Court will give consideration to all the grounds and points raised by defendant in his appeal. It finds that none of the *Grounds* specified in the Statement of Appeal are sufficient and that the judgment of the lower court must be affirmed.

Hereinafter the Court considers the briefs and arguments and specified grounds set up by defendant by treating, in turn, each of the specifications of alleged error set forth by defendant as "Contentions" at page 11, line 20, through page 14, line 1, of defendant's *Statement on Appeal.* Each is discussed under the number given it by defendant; i.e., Contention I,

Contention II, etc., and in each instance defendant's contention is set forth.

I.

DEFENDANT'S CONTENTION I: THE COURT ERRED IN ALLOWING HELEN MONARREZ TO REMAIN IN THE COURTROOM WHEN SHE WAS A WITNESS AND NOT AN OFFICER NOR THE VICTIM OF THE ALLEGED OFFENSE.

There was no error in allowing Miss Monarrez to remain in the Courtroom while excluding all other witnesses. The Court has the discretion to permit some witnesses to remain in the Courtroom while excluding others. It may except one or more witnesses from the operation of an order for exclusion. Such things lie within the discretion of the Court. (48 Cal. Jur. (2d) 356) Unless there was a patent, undeniably, prejudicial abuse of such discretion, the Trial Court's discretion must control. Such prejudicial abuse does not appear here.

II.

DEFENDANT'S CONTENTION II: THE COURT DEPRIVED DEFENDANT OF HIS LEGAL RIGHT TO THE DEFENSE OF MISTAKE OF FACT UNDER PENAL CODE SECTION 26 (Four) BY REFUSING DEFENDANT'S SUBMITTED INSTRUCTION THEREON IN THE EXACT LANGUAGE OF CALJIC INSTRUCTION No. 71-B.

Defendant's claim that he was denied his legal right to the defense of mistake of fact under Penal

Code Section 26 (4) by the refusal of defendant's submitted instruction thereon in the language of CALJIC Instruction No. 71-B is without merit.

It is true that "wilfulness" is an essential element of the crime charged. *(People* v. *Swiggy,* 69 Cal. App. 574) Here, however, defendant is arguing only on construction of the evidence. There is evidence which would belie defendant's paternity of the child. There is evidence also that supports a finding of paternity. Obviously, the jury believed the latter and so found. Of course, the jury also determined his "wilfulness" as required for the commission of the crime. This "wilfulness" could not possibly be belied by any "mistaken" belief that he had in non-intercourse. The jury must have believed he did have such intercourse. This being so, any claim he had of non-intercourse or of belief in non-intercourse could not possibly be considered a "mistake of fact" or as disproving criminal intent. *(People* v. *Fitzpatrick,* 78 Cal. App. 37)

III., IV., V.

DEFENDANT'S CONTENTION III: THE COURT PREJUDICIALLY FAILED TO INSTRUCT THE JURY AS TO THE PURPOSE OF THE TESTIMONY PERMITTED UPON DIRECT EXAMINATION OF THE OTHER CRIMES SHOWN OF STATUTORY RAPE, CONTRIBUTING TO THE DELINQUENCY OF A MINOR AND FURNISHING LIQUOR TO A MINOR.

DEFENDANT'S CONTENTION IV: THE COURT PREJUDICIALLY FAILED TO INSTRUCT THE JURY AS TO THE PURPOSE OF THE TESTIMONY PERMITTED UPON DIRECT

EXAMINATION OF THE CRIME OF FORCIBLE RAPE AT A TIME WHEN THE CHILD COULD NOT POSSIBLY HAVE BEEN CONCEIVED UNDER THE COURT'S LIMITING PERIOD OF BETWEEN JANUARY 1, 1964 and MARCH 31, 1964.

DEFENDANT'S CONTENTION V: THE COURT PREJUDICIALLY ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A MISTRIAL WHEN THE DEPUTY DISTRICT ATTORNEY ADDUCED EVIDENCE OF FORCIBLE RAPE OF THE COMPLAINING WITNESS BY THE DEFENDANT AT A TIME WHEN THE CHILD COULD NOT POSSIBLY HAVE BEEN CONCEIVED AND IN FAILING TO GIVE ANY INSTRUCTIONS AS TO THE PURPOSE OF THIS EVIDENCE.

From the "Settled Statement of Facts" in the record it appears that in the direct examination of the complaining witness, Miss Monarrez, questioning by the Assistant District Attorney did elicit answers that at the time of the 1963 Yolo County Fair defendant "laid me on the seat" and "raped me," and "tore my underpants." However, objection to this was sustained by the Court and the testimony was stricken and the jury was admonished to disregard such testimony. The testimony which was stricken and which the jury was admonished to disregard concerned a time outside the possible period of conception. It appears, however, from the "Settled Statement" that, despite the sustaining of objections on direct examination, and the admonition to the jury, defendant cross-examined the witness on this incident and elicited much of the material of which he now complains.

In view of the strength of other evidence presented in this case, and since the Court adequately admonished the jury, and even after the admonition defendant pursued the subject by questions related thereto, it cannot be said that the above testimony of Miss Monarrez was prejudicially erroneous. (See cases collected in 4 Cal. Jur. (2d)—*Appeal and Error,* Sec. 623 and 624, p. 505, et seq.)

Obviously, no instruction to the jury, apart from the admonition, was required. The Trial Court's refusal to grant defendant's motion for a new trial on grounds concerning the above was proper.

Complaint is made also of failing to instruct the jury as to the purpose of testimony of other crimes, of statutory rape, contributing to the delinquency of a minor, and furnishing liquor to a minor. It appears that the evidence complained of was properly admissible as having a bearing on and tending to prove the commission of the crime charged against defendant. An essential element here, of course, is paternity. Certainly, evidence of sexual intercourse tends to show paternity and evidence of intercourse by Miss Monarrez and defendant prior to the period concerned here (within the not remote past) tended to substantiate the occurrence of intercourse by them at the time of claimed conception. Evidence of previous intercourse is competent to show the probability of the particular act having occurred. *(Berry* v. *Chaplin,* 74 Cal. App. (2) 652; *People* v. *Brazil,* 112 Cal. App. 326)

There is nothing in the record to indicate that a limiting instruction concerning the above was requested by defendant. There is no duty on the Court, absent request, to give such an instruction *(Witkin: California Criminal Procedure,* 477, 478, 479, 492 et seq.)

VI.

DEFENDANT'S CONTENTION VI: THE COURT PREJUDICIALLY ERRED IN REFUSING THE DEFENDANT THE RIGHT TO PRESENT EVIDENCE OF THE UNCHASITY OF THE MOTHER BY CROSS-EXAMINATION AND INDEPENDENT EVIDENCE TO COUNTER THE EVIDENCE OF FORCIBLE RAPE BROUGHT OUT BY THE PROSECUTION. ALTHOUGH ALLOWING THE DEFENDANT TO TESTIFY THAT HE USED NO FORCE ON THE PROSECUTING WITNESS, SINCE THE DEFENDANT WAS ENTITLED TO COUNTER BY ALL PROPER EVIDENCE THE DENIED CONSENT OF THE PROSECUTING WITNESS TO THE CONTENTION ON HER PART THAT FORCE WAS USED.

There is no merit to this claim. The cases clearly establish that it is improper to show intercourse of the mother with other men at times other than at or about the time of conception. (8 Cal. Jur. (2d) 252) The time of possible conception was clearly established in this case.

VII.

DEFENDANT'S CONTENTION VII: THE COURT PREJUDICIALLY REFUSED DEFENSE COUNSEL THE RIGHT TO EVEN ASK QUESTIONS CONCERNING SEXUAL RELATIONS WITH MISS MONARREZ WHICH MIGHT OR MIGHT NOT HAVE INVOLVED IMPEACHMENT OF A WITNESS SUBPOENAED BY THE DEFENSE UNLESS THE DEFENSE CQULD

ASSURE THE COURT IN ADVANCE WHAT THE WITNESS' ANSWER MIGHT BE.

The "Settled Statement of Facts" disposes of this contention. There was no showing that the evidence of Dennis Smith would relate to intercourse with Miss Monarrez during the period of possible conception. Nor does it appear any where that the witness Bailey would testify as to Dennis Smith having said at any time that he had intercourse with her at a definite time, particularly during the period of possible conception. The claimed evidence on this, to the contrary, is rather general.

VIII., IX., X

DEFENDANT'S CONTENTION VIII: THE COURT PREJUDICIALLY ERRED IN REFUSING TO GRANT THE DEFENSE MOTION FOR AN ADVISORY VERDICT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR DISMISSAL FOR FAILURE TO ESTABLISH THE CORPUS DELECTI AT THE CLOSE OF THE PROSECUTION'S CASE.

DEFENDANT'S CONTENTION IX: THE COURT ABUSED ITS DISCRETION IN PERMITTING THE PROSECUTION TO REOPEN ON THE LAST DAY OF TRIAL TO ESTABLISH AN ELEMENT OF THE CORPUS DELECTI WHICH THE COURT HAD PREVIOUSLY RULED WAS ALREADY PRESENT.

DEFENDANT'S CONTENTION X: THERE IS NO EVIDENCE IN THE RECORD OF THE ESTABLISHMENT OF A NECESSARY ELEMENT OF THE CORPUS DELECTI, NAMELY THAT

THE MEDICAL ATTENDANCE WHICH THE DEFENDANT ALLEGEDLY FAILED TO FURNISH WAS IN FACT NECESSARY FOR THE UNBORN CHILD AS DISTINGUISHED FROM THE MOTHER.

The corpus delecti was established by the prosecution. Whether this was done before the prosecution was permitted to reopen its case in chief or after is really not material. However, it does appear that all necessary elements were established prior to the reopening. The reopening, of course, was entirely within the discretion of the Trial Court. Defendant ignores the fact that the Court could, in its discretion, allow the prosecution's case in chief to be reopened to buttress its case instead of for supplying missing elements of the corpus delecti.

The complaint before the Court, and upon which trial was held, charged that defendant "did wilfully and unlawfully omit without lawful excuse to furnish medical attendance to Helen Monarrez, and the unborn child," a violation of Penal Code Section 270. Within the provisions of Penal Code Sections 959 and 960 there seems to have been no prejudice to defendant in the form of the complaint. The jury was instructed on Section 270 insofar as it relates to the child. It is true that this instruction concerns a much broader field than mere lack of "medical attention" to the infant. However, the record supports a finding that there was no furnishing of medical attention by defendant to the child at the time concerned. As a matter of fact, this is strengthened by the showing that there was no furnishing at the time of delivery as well, both of

which services were attested to by Dr. Sobeck. The failure of defendant to furnish such medical attendance was testified to by Miss Monarrez.

Wilfulness and lack of lawful excuse are presumed from the evidence of omission by defendant to furnish the medical attendance. (Penal Code Sec. 270)

The establishment of paternity has already been discussed.

The evidence, fairly construed, does show that the corpus delecti was established.

XI.

DEFENDANT'S CONTENTION XI: THE COURT PREJUDICALLY ERRED IN FAILING TO ALLOW THE DEFENSE TO ESTABLISH EVIDENCE SHOWN BY DEFENDANT'S OFFERS OF PROOF.

The various offers of proof made by defendant (in addition to those already considered) have been reviewed. The Court had restricted (properly) the evidence of intercourse by Miss Monarrez with others than defendant to a definite period. The law on this has been discussed previously. The offers of proof of intercourse of others with her at other times were properly rejected.

The offer of proof concerning testimony of one Dennis Smith and of other witnesses concerning statements of said Smith was properly rejected. The crux of this offer has been discussed hereinabove.

There was no prejudice or error in the ruling of the Court on the offer of proof concerning the testimony of Bill D. White.

XII.

DEFENDANT'S CONTENTION XII: THE DEPUTY DISTRICT ATTORNEY WAS GUILTY OF PREJUDICIAL MISCONDUCT BEFORE THE JURY IN MISSTATING THE EVIDENCE IN ARGUMENT, IN REPEATEDLY PERSONALLY ATTACKING DEFENSE COUNSEL, ASKING DEGRADING AND IRRELEVENT QUESTIONS OF THE DEFENDANT ON CROSS EXAMINATION, IN BRINGING OUT EVIDENCE OF OTHER IRRELEVENT CRIMES OF THE DEFENDANT WITHOUT STATED PURPOSE OR SUBMITTED LIMITING INSTRUCTION, IN ARGUING THE NECESSITY OF SUPPORT PAYMENTS TO THE JURY, IN ARGUING AGE DISCREPANCY, MISMATCH, ANIMAL ACT, ANIMAL PASSION, AN ACT OF PURE LUST, NO LOVE ON THE PART OF THE DEFENDANT AND SIMILAR CHARACTERIZATION, IN IMPROPERLY ASKING HIS OWN WITNESSES IF THEY WERE TELLING THE TRUTH AND IF THEY KNEW THE MEANING OF THE OATH.

The actions and statements of the Assistant District Attorney in this case were far from exemplary. However, while not condoning them, the Court cannot say that any one of them, or the aggregate of them, constituted prejudicial error. Undoubtedly, they were vexatious. The Trial Court exercised proper discretion in the handling of these matters when objection was made thereto. The vexation caused and the poor impression that such matters may have had on the jury, are more than offset by the strength of the case against defendant.

XIII.

DEFENDANT'S CONTENTION XIII: THE COMPLAINT IMPROPERLY CHARGES AND THE VERDICT IMPROPERLY FINDS THE DEFENDANT GUILTY OF FAILING TO PROVIDE FOR HELEN MONARREZ WHICH IS NOT A CRIME IN THE STATE OF CALIFORNIA.

The complaint herein charges non-support of "Helen Monarrez, and the unborn child." The jury was instructed only on non-support of the child. The whole trial proceeded on that basis. There seemed to be no doubt about that—at any time during the trial, while evidence on the paternity issue, on the lack of furnishing of medical attendance, or on other matters was presented. The verdict is simply of guilt of violation of Penal Code Sec. 270.

A fair degree of liberality in pleading is permitted under Penal Code Sec. 959 and 960. No substantial right of defendant was infringed.

See: Penal Code Sec. 956, 957, 959, 960. In re *Messner,* 30 Cal. App. (2) 290.

XIV.

DEFENDANT'S CONTENTION XIV: THE COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR A NEW TRIAL UPON THE ABOVE GROUNDS AND UPON THE AFFIDAVIT OF LESLIE C. CALDWELL, JR., AS TO NEWLY-DISCOVERED EVIDENCE WHICH COULD NOT, WITH DUE DILIGENCE, HAVE BEEN DISCOVERED AND PRODUCED BY THE DEFENDANT UPON TRIAL AND WHICH IS

MATERIAL TO THE DEFENDANT IN THAT IT INVOLVED A DIRECT ADMISSION BY THE PROSECUTING WITNESS THAT SOMEONE ELSE IS THE FATHER OF THE CHILD IN QUESTION.

In the absence of abuse, the Court must abide by the discretion of the Trial Court in refusing to grant a new trial upon the ground of newly discovered evidence. There appears to have been no abuse of discretion here sufficient to hold the Trial Court in error. At the best, insofar as it might be relevant, the new evidence would only have heightened conflicts already in the record or have been cumulative of evidence already adduced.

There appears to be no merit in any of the grounds specified as being relied upon by appellant on this appeal. (Page 1, line 21 to Page 2, line 1, of Defendant's Statement on Appeal.) Accordingly, the judgment of the Trial Court is affirmed.

Dated: November 29, 1965.

James C. McDermott
Judge of the Superior Court

APPENDIX B

CALIFORNIA PENAL CODE

§ 270. [Omission to provide: Liability of father: Grade of offense: Punishment: Construction of statute: Proof of wilfulness: Proof that father outside state: Liability of mother: Application of section.] A father of either a legitimate or illegitimate minor child who wilfully omits without lawful excuse to furnish necessary clothing, food, shelter or medical attendance or other remedial care for his child is guilty of a misdemeanor and punishable by a fine not exceeding one thousand dollars or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment. If the father, during such violation, remains out of the State for 30 days, or if he fails or refuses to comply with the order of a court of competent jurisdiction requiring him to make any provision for the maintenance, support, medical treatment or other remedial care of such minor child and remains out of the State for 10 days without doing so, he is guilty of a felony. This statute shall not be construed so as to relieve such father from the criminal liability defined herein for such omission merely because the mother of such child is legally entitled to the custody of such child nor because the mother of such child, or any other person, or organization, voluntarily or involuntarily furnishes such necessary food, clothing, shelter or medical attendance or other remedial care for such child, or undertakes to do so. [*Proof of wilfulness.*] Proof of abandonment or desertion of a child by such father, or the omission by

such father to furnish necessary food, clothing, shelter or medical attendance or other remedial care for his child is prima facie evidence that such abandonment or desertion or omission to furnish necessary food, clothing, shelter or medical attendance or other remedial care is wilful and without lawful excuse.

[*Proof that father outside State.*] Proof of abandonment or desertion of a child by such father or omission by such father to furnish such food, shelter, clothing or medical attendance or other remedial care for more than thirty (30) days is prima facie evidence that such father was outside the State.

[*Liability of mother.*] In the event that the father of either a legitimate or illegitimate minor child is dead or for any other reason whatsoever fails to furnish the necessary food, clothing, shelter or medical attendance or other remedial care for his minor child, the mother of said child shall become subject to the provisions of this section and be criminally liable for the support of said minor child during the period of failure on the part of the father to the same extent and in the same manner as the father.

[*Application of section.*] The provisions of this section are applicable whether the parents of such child are married or divorced, and regardless of any decree made in any divorce action relative to alimony or to the support of the child. A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned. [Enacted 1872; Am. Stats. 1905, p. 758; Stats. 1909, p. 258; Stats. 1915, p. 572; Stats. 1917, p. 252; Stats. 1921, p. 1723; Stats. 1923, p. 592; Stats, 1925, p. 544; Stats. 1931, p. 1438; Stats, 1939, p. 2783; Stats. 1955, ch. 753, § 1; Stats. 1957, ch. 139, § 32, ch. 1855, § 1.]

CALIFORNIA PENAL CODE

§ 1471. Transfer to district court of appeal; grounds; exception; power of reviewing court

A district court of appeal may order any case on appeal within the original jurisdiction of the municipal and justice courts in its district transferred to it for hearing and decision as provided by rules of the Judicial Council when the superior court certifies, or the district court of appeal determines, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

No case in which there is a right on appeal to a trial anew in the superior court shall be transferred pursuant to this section before a decision in such case becomes final therein.

A court to which any such case is transferred shall have similar power to review any matter and make orders and judgments as the superior court by statute would have in such case, except as otherwise expressly provided and except that if the case was tried anew in the superior court, the reviewing court shall have similar power to review any matter and make orders and judgments as it has by statute in a case within the original jurisdiction of the superior court. Added Stats. 1961, c. 693, p. 1935, § 18, operative Jan. 2, 1962.)

CALIFORNIA RULES OF COURT

Rule 63. Certification

(a) [Authority to make] The superior court on application of a party or on its own motion may certify that the transfer of a case to the District Court

of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. Such certification may be made by a majority of the judges of the appellate department or, in a county having no appellate department, by the judge hearing the appeal. When there was a trial in the superior court, the judge who tried the case may make such certification. If any judge of the appellate department who participated in the decision is unable to act on the certification, then a judge designated or assigned to the appellate department by the chairman of the Judicial Council may act in his place. If the judge who heard the appeal or tried the case is unable to act, then the certification may be made by a judge designated by the presiding judge or, if there be no presiding judge, by any judge of the court.

(b) [Application for certification] Any party may apply to the superior court for the certification of a case after judgment in that court. If there was no trial in the superior court such application shall be served and filed before the judgment on appeal becomes final as to that court and may be included in any petition for rehearing. If there was a trial in the superior court the application shall be served and filed at least 10 days before expiration of the time for certification. Any other party may serve and file an opposition within five days after the filing of the application. No hearing shall be held on the application and the failure of the court to certify the case shall be deemed a denial of the application.

(c) [Time] The certification of a case in which there is no trial in the superior court shall be filed with the clerk of that court at any time after the record on appeal and the briefs, if any, are filed in

the superior court and not later than 10 days after the judgment on appeal becomes final as to that court. The certification of a case in which there was a trial in the superior court shall be filed within 30 days after entry of the judgment or 15 days after service of written notice of entry of the judgment, whichever is earlier, in a civil case, or within 15 days after rendition of the judgment in a criminal case, unless the time is extended as provided in subdivision (d) of this rule.

(d) [Extension of time] The time for filing the certification of a case shall be extended by new trial proceedings or proceedings to vacate a judgment in the same manner, to the same extent, and for the same period as the time for filing notice of appeal is extended by such proceedings pursuant to rule 3 of the Rules on Appeal.

(e) [Contents] The certification shall contain a brief statement setting forth any conflict of decision (with citation of or reference to decisions creating the conflict, if there is no written opinion by the superior court) or important question of law to be settled and shall state whether there was a judgment in the superior court, and, if so, the nature and the date thereof.

(f) [Transmission] Upon the filing of the certification the clerk of the superior court shall forthwith transmit a certified copy thereof to the clerk of the District Court of Appeal and shall mail notice of such certification to each of the parties and also to the Attorney General in a criminal case.

APPENDIX C

IN THE JUSTICE COURT OF THE WOODLAND JUDICIAL DISTRICT, COUNTY OF YOLO, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.
THOMAS HARLING,
Defendant.

No. 2997
No. 2A-3676

SETTLED STATEMENT OF FACTS

Miss Monarrez was allowed to remain in the courtroom with the prosecutor, seated at the counsel table, over objection of Defense Counsel made on the morning of the second day of trial after the court had ruled that all witnesses in the case be excluded except Miss Monarrez and the defendant. The court observed Miss Monarrez cry on one occasion during the cross examination of the defendant when he testified that he did not love her, and once during her own cross examination. At other times she was restrained.

She testified in chief for the prosecution and also on the last day of trial when the prosecution was permitted to reopen his case in chief over the objection of defense counsel. Defense counsel had previously moved for a dismissal or an advisory verdict of acquittal

upon the ground that the corpus delecti was not established. Argument was made by defense counsel and the prosecutor in reply. The motions were denied. Defense counsel did request the court to specifiy the evidence in the case upon which the court relied for its ruling. The court stated that the jury had heard the testimony of all the witnesses and therefore that "it was a matter for the jury" to recall the testimony of the witnesses. The trial court then permitted the People to reopen its case to clear up any possible ambiguity regarding the question concerning Mr. Harling's failure to provide necessary food, clothing, shelter or medical attendance or other remedial care.

Miss Monarrez then testified that Mr. Harling had failed to provide any food, clothing, shelter, or medical attendance, and that he had not paid her any money.

Miss Monarrez testified on direct examination that she did not consent to the act of sexual relations on the first occasion during the Yolo County Fair in 1963. She testified that she went with the defendant in his car into the country at approximately nine or ten at night. He stopped at the Canteen and bought some beer. They started making out—"kissing". The witness then testified that he "laid me on the seat", and "raped me". Objection by defense counsel was made and sustained by the court. The next question by the prosecutor was "What did he do next?". The witness answered, "He tore my underpants". Objection was again made by defense counsel and an assignment of misconduct was made that such interrogation and evidence was highly prejudicial to the defendant and his rights in that it brought before the jury evidence of the crime of forcible rape at a time when the child

could not possibly have been conceived and was of such an inflammatory nature that a mistrial should be granted. The prosecutor in response to this objection and motion stated to the court that Miss Monarrez's testimony of "rape" came as a surprise to him and that if allowed to continue questioning the witness it would be developed that in fact no forcible rape occurred. The objection was sustained by the court. The testimony of forcible rape was ordered stricken, and the jury was admonished to disregard such testimony. The motion for a mistrial was denied. The court does not recall other crimes being enumerated in the motion for a mistrial except forcible rape. There was no further testimony on direct examination of this act of sexual relations; however, Miss Monarrez was questioned on cross examination as to the facts and circumstances of the first act of intercourse between the appellant and herself during which examination she testified that the defendant, "Ruined and tore my zipper".

Helen Monarrez further testified that the next act of sexual relations occurred on New Years Day, 1964 in Tom's car, and that it was a voluntary act on her part. She further stated that Tom had a bottle of Vodka in his car.

She testified that the child, Jana Rosalyn Monarrez, born 11-7-64 was conceived on February 18, 1964. Tom picked her up in his car to go to the basketball game with Arbuckle in Esparto, but instead he drove into the country and parked. She testified that she told the defendant that she loved him, to which he replied that "I should prove it". They had sexual relations after which they had an argument and she stated that she hit him in the nose causing his nose to bleed, and told

the defendant that if she got pregnant, "I'd keep the baby". She testified that no contraceptives were used.

Miss Monarrez testified that the last act of sexual relations with Tom Harling occurred on the Saturday night before Easter Sunday, and that the baby's father was Tom Harling.

Miss Monarrez further testified that she went to Dr. Sobeck of Davis with reference to her pregnancy and on cross examination that she had seen him once prior to filing the complaint. She testified that previously she had visited Dr. Loder in Esparto because she was nervous and rundown. Defense counsel made no objections to testimony of Miss Monarrez relating to the defendant's purchasing or use of alcoholic beverages.

On cross examination defense counsel with reference to the meeting at the county fair asked the witness Miss Monarrez, if it were not true that she told Tom, "I wish you'd rape me." The witness denied saying this after an objection by the prosecutor to the question was overruled. Miss Monarrez thereafter was cross-examined as to what alcoholic beverages were consumed by Tom Harling and her after leaving the fair grounds. She testified that Tom purchased Olympia beer in bottles, that she opened the bottles and drank some but not much because she didn't like it. She further testified on cross-examination that she was wearing white levis, cut off at the knees; that her undergarments were torn; that she hid her clothing after she got home, and that she told no one of the incident.

The defense then made the following offer of proof outside the presence of the jury:

1. That Jerry Harling would testify that he had relations with Helen Monarrez before his brother, the

defendant, but that this was not within the period allowed by the court.

2. That Mike Kolb would testify that he had sexual relations with Helen Monarrez but not within the period allowed by the court. Both the Kolb and Jerry Harling testimony were as to times prior to the birth of the child in question.

3. That Dennis Smith had advised defense counsel that he had had relations with Miss Monarrez but not as to the date thereof. That on the eve of trial the said Dennis Smith had called defense counsel advising him that he, Dennis Smith, planned to repudiate what he had formerly stated as to sexual relationship and would testify that he had not had relations at all. That defense counsel had stated that he planned to call him to the witness stand to obtain his testimony under oath and that he assumed that he, Dennis Smith, would tell the truth.

4. That the defense had all three of the above witnesses under subpoena and, in addition, a witness named LeRoy Bailey who had heard the said Dennis Smith make an admission that he (Dennis Smith) had had relations with Helen Monarrez "quite recently" before whe announced that she was pregnant but that "you have to watch out, it has the crabs."

5. It was stipulated that the above offer of proof was properly made and that the witnesses need not be sworn and asked the questions.

The defense urged the admissibility of the above evidence upon the grounds that if other acts of intercourse with the defendant at times when the child could not possibly have been conceived were probative to show probable intercourse with the defendant when the child was in fact conceived, that then other acts of intercourse with other men were just as probative to

show that they might be the father during the period of conception. The defense urged that it was hightly prejudicial to allow evidence of the other acts with the defendant as probative to the main charge when they could not possible yield the pregnancy in question but to preclude acts with other men during the same interim.

The defense further urged that since the prosecution had brought in evidence of forcible rape and opened up this inquiry that the defense should at least be allowed to neutralize this inflammatory and prejudicial testimony as to an episode entirely collateral to the act of conception which Miss Monarrez contended yielded her pregnancy by proper testimony as to her chastity as permitted in cases of forcible rape and any other proper impeachment.

The court sustained the prosecutor's objections to all of the above testimony. The defense was permitted to allow the defendant to deny any force. The court ruled that evidence as to acts of sexual relations with Miss Monarrez was limited to the period between January 1, 1964 and March 31, 1964. Defense counsel was limited to making inquiry concerning other sexual activities on the part of Miss Monarrez unless the defense was prepared to prove by way of impeaching evidence in the event of a denial that she did in fact have relations during the period of possible conception. The court had previously ruled that evidence of forcible rape, be striken from the record. Defense counsel did make reference to forcible rape at times throughout the trial. The court on several occasions admonished the jury that they were not to consider evidence of other crimes.

Miss Monarrez testified that she had been out on dates with the following boys: Jerry Harling, Ron Giovanetti, Mike Coulter, Jim Wertman, Dennis Smith, Walter Olson, Brian Crutcher, and Mike Joy. She denied being out with the following boys: Mike Kolb, Gary Easterly, Art Tunstall, Jimmy Moore, Terry Holland, John Rademaker, Dennis White, Cliff White, Gary Warren, Dale Lang, Eddie James, Brad Tillinghouse, Johnny Perez, and John Travis.

Miss Monarrez further testified under cross-examination that on February 18, 1964, after Tom had picked her up that he purchased a bottle of 100 proof alcoholic beverage at Lindberg's bar, that they parked for one and one-half hours the other side of Capay and that they had sexual relations. During and argument she hit Tom in the nose causing his nose to bleed. She drove the car thereafter because Tom was drunk and she picked up Judy Perrazo and Peg Weatherford and went to her home. Martin Monarrez and Frankie Creamer came to her home later.

The witness testified on both direct and cross examination that she loved the defendant and that she and Tom had discussed marriage on several occasions. The court does not recall any objections being made by defense counsel on direct examination to this line of questioning.

Under cross-examination she denied telling LeRoy Bailey on March 22, 1965, that "I would marry Tom if he came back to me. Tom is a good lover and good in bed."

Objections were made by the prosecutor during cross-examination with reference to the number of boys referred to. That such questions were designed to lay the foundation for impeachment and that there

should be some limit to the number of persons referred to. The objections were overruled by the court on each occasion.

Witness Judy Perrazo testified, after being called by the prosecution, that the defendant was with Miss Monarrez on the night of February 18, 1964, and that she saw appellant in the home of Miss Monarrez that evening. On cross-examination she was asked whether or not she was a friend of Helen Monarrez and nothing more. She answered that she was. Thereafter, she was excused and stepped down from the stand. As she was about to leave the courtroom the prosecutor asked her to again resume the stand and asked her, over objection, if she was "telling the truth?" and if she "knew the meaning of the oath?" Objection was made by defense counsel to this line of questioning. The objection was sustained as to the question of "telling the truth" but the witness was permitted to answer whether "she knew the meaning of an oath".

Dr. Frederick Sobeck of Davis testified that he examined Helen Monarrez 9-2-64 in his office with regard to her pregnancy. He testified that she was seven months pregnant, based on the size of the uterus which was 20 centimeters, or 8 inches. Based on his examination and the statement of Helen that her last menstrual period was 1-28-64, he predicted that the child would be born 11-2-64. He further testified that he delivered the child 11-7-64.

The court does not recall any direct testimony from Dr. Sobeck as to medical "needs" of the unborn child as distinguished from the "mother".

Peggy Weddle was called by the people and testified that she saw Tom Harling after the basketball game on February 18, 1964, at Miss Monarrez's home. She

testified that Tom had a swollen nose and that Tom and Helen were "acting up".

Miss Yvonne Christine Haley testified for the people that she was present at the apartment of LeRoy Bailey in March or April of 1964 when both Helen and Tom were present. She further testified that Helen told her "We're getting married". She was recalled by defense counsel and testified that Helen had Jerry Harling's ring and that she had gone with him.

Witness Martin Monarrez testified that the defendant stated to him on March 18, 1964, "I hate to tell you this. I think I've got your sister pregnant. Do you have any objection to my being your brother-in-law?"

Appellant admitted this statement and said that he thought he was the father of the child until he started to count back and figured out when the last time was that he had intercourse with Miss Monarrez. This was between November 20th and 30th of 1963, according to the defendant, and Miss Monarrez did not tell him at first how far along she was so he figured it could be him. When he did find out, he denied the child was his at all times. He testified that he was ill in bed at the time of the alleged conception on February 18, 1964 and got up that day only to see the doctor.

In his opening argument the prosecutor contended that Martin Monarrez testified to seeing Tom Harling in his home on February 18, 1964, following a basketball game. Defense counsel in his argument contended that there was no such testimony given. Objection was made by the prosecutor. The court advised the jury that this was argumentative, that they had heard the testimony of all the witnesses,

and that it was a matter for them to recall the testimony of each witness. The court has no notes that Mr. Monarrez testified as indicated by the prosecutor.

Dr. John Loofbourow, M.D. testified that defendant was in his office on that date with acute virus with pleurisy and on that date was "markedly improved" but had cyclical relapses both before and after that date.

On cross-examination of the defendant the prosecutor asked Mr. Harling whether he loved Miss Monarrez, how he felt towards her during the acts of sexual relations, and whether or not that he told her at any time that he loved her. Mr. Harling testified that at no time had he loved her. He did admit that the subject of marriage had been discussed with Helen. It was during this cross-examination of Mr. Harling that the prosecutor used the words "pure lust", "pure animal act" and "animal gratification". Objection to this questioning was made by defense counsel and sustained by the court. No prior objection had been made by defense counsel which had been overruled.

Bill D. White testified that Helen Monarrez told him that Tom used force upon her during the first act of sexual relations. The defense claimed surprise as to this testimony and sought to impeach Mr. White as a defense witness upon the ground that Mr. White had told LeRoy Bailey that Miss Monarrez had voluntarily consented to intercourse upon each occasion when she was with the defendant. An offer of proof was made by the defense counsel concerning the impeaching testimony and the claim of surprise. The court denied the offer of proof. The court denied defense the right to proceed with evidence as to forcible rape. The court does not recall denying de-

fense the right to call witness Bailey who did testify later.

Neal F. Henock, personnel director of Kordite testified that the defendant was not at work on the date in question, February 18, 1964 and was off work from February 7, 1964, through March 23, 1964 when he returned.

Mrs. Thelma Harling testified that she took care of defendant while he was ill during the above period and that he was at home on February 18, 1964 and did not leave the house except to go to the doctor's office. She further testified that the doctor told Tom to stay in bed and that he did stay in bed until March 6th during which time she served him meals in bed, because of his weakness.

The court does not recall Mrs. Harling's exact testimony to be "that her son was so weak that all he could do was lift his head from the pillow". The prosecutor in his argument to the jury used this sentence substantially as set forth prefaced by "Mrs. Harling would have you believe".

Orvis LeRoy Bailey testified to two parties held in his apartment when his wife was gone at which time Miss Monarrez was in attendance. One was after the pregnancy of Miss Monarrez and one was before. Witness Bailey testified that Miss Monarrez was present along with Dennis Smith at the party after the conception, about Easter of 1964. The witness did not testify that Miss Monarrez and witness Smith were at the party on a date together. An offer of proof was made by defense counsel that it was at this party that witness Bailey heard witness Smith admit to sexual relations with the complaining witness within a short time before.

Objection was made by the prosecutor to testimony of any other acts of sexual relations being presented to the jury, except during the period of concepton.

The court recalls that during argument between counsel following this objection before the jury, the prosecutor used some of the following phrases: That the defense counsel was "highly unethical", "highly unprofessional", "grossly unprofessional", "guilty of unprofessional conduct", "deliberately trying to get before this jury questions that he knows are even improper to ask", "I don't know whether I can assign misconduct to defendant's counsel or not" and "I assign defense counsel as being guilty of prejudicial misconduct."

The prosecutor made the above phrases throughout the trial during objections to defense questions or statements. The court on several occasions after heated exchanges between counsel admonished the jury that argument and statements of counsel were not evidence and that they were to consider only the evidence presented to them as to the crime charged.

Dennis Smith testified for the people. He testified that he saw Helen and Tom together about the last of March or April at LeRoy Bailey's apartment. He was not with Helen Monarrez. LeRoy Bailey was present.

I, Clarence Walden, Judge of the Justice Court, Woodland Judicial District, hereby certify that the above is a true and correct statement of the evidence and proceedings in the trial court in the above entitled action.

DATED: June 29, 1965

CLARENCE WALDEN

JUDGE

Engrossed this 28th day of June, 1965 but to include additionally all of appellant's specifications of grounds on appeal in accordance with Rule 7 and as set forth in Appellant's STATEMENT ON APPEAL.

HARRY A. ACKLEY

Attorney for Appelant

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